No. 21255

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS M. MURRAY; CYNTHIA ANN WENTY and CECELIA MARIE WENTY, Minors, by CLIFFORD H. WENTY, Their Guardian *Ad litem*,

Appellants,

vs.

THE UNITED STATES OF AMERICA, a Sovereign Body,

Appellee.

APPELLANTS' OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

This is an appeal from an order entered on May 27, 1966, by the Honorable Charles H. Carr, Judge, United States District Court, Southern District of California, granting defendant's Motion to Dismiss without leave to plaintiffs to amend their Complaint, and dismissing their action with prejudice (R. 24-25). The underlying action was brought under the authority of 28 U.S.C. Sections 1346, 1402 and 2671-2680 (R. 3). The plaintiffs, on July 12, 1966, filed in this Court a timely application for Appeal under 28 U.S.C. 1291 (R. 30-31). This Court's jurisdiction accordingly rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE.

Barbara Murray, deceased, was the wife of Louis Murray and the mother of Cynthia Ann Wenty and Cecelia Marie Wenty. The deceased was killed in an automobile accident occurring on U.S. Highway 101-A on March 1, 1964. Louis Murray for himself, and the two daughters through their guardian *ad litem,* under authority of 28 U.S.C. 1346, 1402 and 2671-2680 (R. 3), brought an action for the wrongful death of Barbara Murray. The complaint alleged that the defendant, The United States of America, acting through its agents, conducted a ship's party in a Non-Commissioned Officers Club for the crew members of the U.S.S. Colohan. This party was attended by Jon David Allen, a member of the crew of the U.S.S. Colohan.

The complaint alleged that said Allen became intoxicated at said party, in whole or in part by intoxicating liquor sold or given away by the agents or servants of the defendant, The United States of America. The complaint further alleged that said agents continued to serve said Allen intoxicating liquors after he was already under the influence of intoxicating liquors knowing that he would thereafter drive his automobile.

The complaint alleged that, thereafter, said Allen drove his car negligently and recklessly on Highway 101-A in such a manner as to cause it to collide with the deceased's automobile, thereby causing her death.

On May 27, 1966, the District Court entered its order granting defendant's Motion to Dismiss without leave to plaintiffs to amend their complaint, and dismissing their action with prejudice (R. 24-25). This appeal followed (R. 30-31).

ARGUMENT.

It Was Error for the District Court to Dismiss, Because the Complaint States a Cause of Action for Negligence, Based Upon Principles Clearly Expressed and Frequently Followed by the California Supreme Court.

In its argument in the Court below, defendant pointed out that

> "it is a well established principle that in a case such as this, the Federal Court should apply that law which the State Court would apply in such a case. 28 U. S. C. A. 1346(b); *Gilsoul v. U. S.*, 347 Fed. 2d 730 (7th Cir. 1965); *Ashley v. U. S.*, 215 Fed. Supp. 39 (D. C. Neb. 1963)."

However well established the principle, Federal District Courts nevertheless are at liberty to anticipate that a State Court will abandon a doctrine that is outmoded or discredited. *Hopper v. U.S.*, 244 Fed. Supp. 314, 318 (1965).

In the *Hopper* case, the Federal District Court was faced with the question of whether or not there could be recovery by a bystander-witness to an accident where the bystander-witness suffered mental suffering because of the effects of being such a witness. There was no "impact" insofar as the bystander-witness was concerned.

The Court was to apply Colorado law, but the Colorado Supreme Court had never decided the question of whether or not there could be recovery by a bystander in a situation where there was no impact. The Court said, at page 318:

> "Like the impact rule it will be a matter of case to case attrition until its erosion is complete. In

> the meantime it would be indeed presumptuous for this court to make an Erie prediction that the Supreme Court of Colorado will repudiate the limitation in one fell swoop. Although the specific question has not been before the Colorado Court, the available evidence does not show that it has any aversion to the limitation in question. In the light of the numerous American cases which hold non-liability in circumstances like the present, it cannot be predicted that the Supreme Court of Colorado would be likely to adopt a rule contrary to the formidable array of cases holding non-liability."

Because there were no Colorado cases, the Court applied the majority view.

Defendant, in its argument before the Court below, urged that *Hopper* had no application, because "there are numerous cases in California, all of which hold that there is no liability, where the alleged act or omission is the sale of intoxicating beverages to one who becomes intoxicated or is already intoxicated." This argument seeks to evade the issue; defendant is blind to the fact that the California cases it cites are readily distinguishable from the facts herein.

Defendant is also blind to the fact that the California Supreme Court has often seen fit to stake out new judicial ground. "The responsibility to keep the law straight is a high one," Chief Justice Traynor has written.

> "It should not be reduced to the mean task of keeping it straight and narrow. We should not be misled by the cliche that policy is a matter for the Legislature and not for the courts. There is always an area not covered by legislation in which the courts must revise old rules or formulate new ones, and in that process policy is often an appropriate and even a basic consideration." 24 *U. of Chicago Law Review* 211, 219 (1957).

Defendant is also apparently unaware that the applicable sections of the California Business and Professions Code, hereinafter discussed, have never been considered by the appellate courts in California in the present context.

In the court below, defendant relied upon *Cole v. Rush,* 45 Cal. 2d 345 (1955), which adhered to the general principle that the common law gives no remedy for injury or death following the mere sale of liquor to the ordinary man, either on the theory that it is a direct wrong or on the ground that it is negligence, which imposes a liability on the seller for damages resulting from the intoxication. Specifically, the decision in the *Cole* case says (at p. 356):

> "Since it is established by both the common law and by the decisional law in this state (1) that as to a *competent* person it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use; (2) that the *competent* person voluntarily consuming intoxicating liquor contributes directly to any injury caused thereby; and (3) that contributory negligence of the decedent bars recovery by the heirs or next of kin in a wrongful death action. . . ." (Emphasis supplied.)

It is submitted that in the present case the foregoing language has no application. In the first place, plaintiffs' decedent was not contributorily negligent; in the second place, a drunk is not a competent person, and Jon David Allen, the deceased sailor who was served the intoxicants by the agents of the defendant, The United States, was not, by reason of his previous intoxication, a *competent* person.

Defendant also cites *Dwan v. Dickson,* 216 Cal. App. 2d 260 (1960), which followed *Cole v. Rush, op. cit. supra,* but applied the rule of that case on facts which more closely approximate those in the case at hand. Plaintiffs submit that the court in *Dwan* applied the rule of *Cole* in ignorance of the fact that the Legislature had provided a standard upon which to judge whether or not negligence exists in such cases. We will refer to this point specifically in following paragraphs.

We live in a motorized society. The increased frequency and severity of "accidents" resulting from intoxication is a subject of grave national concern. Consequently, as the civil remedies embraced within the tort of negligence expand in California to provide recovery in an ever increasing variety of situations, it follows that the Courts in this State should carefully examine the conduct of a purveyor who sells or gives intoxicants to a customer whom the purveyor knows is predisposed to the misuse of alcohol, *i.e.*, either already drunk or unusually likely to become so, and to exercise poor judgment in operating an automobile while under the influence of liquor.

It is familiar law that a cause of action for negligence consists of four elements: (1) the duty of the defendant with respect to the injured person's injury; (2) the violation of that duty; (3) the causal relation between the defendant's conduct and the injury suffered; and (4) the plaintiff's loss, *i.e.,* damages. Prosser, Torts (3d Ed.), page 146.

California courts have frequently held that negligence may be a proximate cause of injury even though a foreseeable negligent act intervenes.

The unlocked car cases illustrate the point. In *Richards v. Stanley* (1954), 43 Cal. 2d 60, 63, the court held that an owner of an automobile is generally under no duty to persons injured by one who steals the car. This was held true despite an ordinance requiring that cars be locked, on the grounds that the ordinance was held not designed to protect the victim of the thief's negligence. On page 65 the court said: "Ordinarily . . . in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another," and the court pointed out (on p. 66) that "in the present case Mrs. Stanley did not leave her car in front of a school where she might reasonably expect irresponsible children to tamper with it. . . ."

In a later case, *Richardson v. Ham* (1955), 44 Cal. 2d 772, a construction partnership was held liable for leaving an unlocked bulldozer in a place where it was readily accessible to teen-agers, and three of them did misappropriate it, subsequently seriously injuring the plaintiffs. The court held (on p. 776) that there was a reasonably foreseeable risk that defendants' bulldozer might be tampered with when left unattended. In *Hergenrather v. East* (1964), 61 Cal. 2d 440, the doctrine was extended, and liability was held to apply where a 2-ton truck was left unlocked and parked overnight on a city street known as "skid row."

It is true that California has no civil damage, or Dramshop Act. It is also true that "the Legislature of California has at no time seen fit to adopt a statute inconsistent with the common law so far as concerns a remedy for injury or death following the furnishing of liquor to the ordinary man." *Cole v. Rush, op. cit.*,

supra, page 355. It is to be noted, however, that the drunkard or one otherwise incapacitated, as by intoxication, is not an *ordinary man,* and the Legislature has adopted a statute which pertains to the drunk.

Business and Professions Code, Section 23001 could hardly be more explicit as to the persons it is designated to protect. It is

> "an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social and moral well-being *and the safety of the State and of all its people.* All provisions of this division shall be liberally construed for the accomplishment of these purposes." (Emphasis supplied.)

In light of the general purpose thus expressed, the fact that the Legislature then forbade the sale of liquor to drunkards or intoxicated persons (Sec. 25602) surely suggests legislative recognition that such sales pose an unreasonable risk.

In its points and authorities furnished the court below, defendant implied that Section 25602 of the Business and Professions Code had been considered by the court in making its decision in *Cole v. Rush, op. cit., supra.* Close examination of the opinion in that case

(at p. 356) leads to the conclusion the court was entirely unaware of Business and Professions Code, Section 25602; viz:

> ". . . in the 10 years immediately following the decision in the Hitson case (1943) the Legislature made numerous changes in statutes governing the sale, use, and furnishing of intoxicating liquors (see e.g., Stats. 1945, pp. 1023, 2295, 2615; Stats. 1947, pp. 2003, 2051, 2490, 2791, 2936, 3019, 3025; Stats. 1949, pp. 492, 1546, 1582, 1884, 2060, 2349, 2735; Stats. 1951, pp. 1897, 2814, 3051; Stats. 1953, pp. 646, 918, 954, 1949, 2084, 3345) and also in statutes having to do with various aspects of tort liability (see e.g., Civ. Code, §§ 43, 43.5(a), 45a, 46, 47, 48, 48a, 48.5, 171(c), 956, 1714.5, 1714.6, 3341, 3342; Code Civ. Proc., § 377), but there was no adoption of a statute imposing liability in such a case as is now before us."

The writer has been able to find only six decisions of California appellate courts in which Business and Professions Code, Section 25602 was squarely before the court:

Harris v. Alcoholic Bev. Etc. Appeals Bd., 62 Cal. 2d 589;

Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd., 169 Cal. App. 2d 785;

Skipitar v. Munro, etc., 175 Cal. App. 2d 1;

Samaras v. Dept. of Alcoholic Bev. Control, 180 Cal. App. 2d 842;

People v. Frangadakis, 184 Cal. App. 2d 540;

Peck's Liquors, Inc. v. Superior Court, 221 Cal. App. 2d 772.

None of the factual situations required consideration by the court of the Code section as a standard of conduct in a civil action. Accordingly, plaintiffs submit that in this context, it has never been construed by the California appellate courts, and it logically follows that if specified conduct is thus prohibited by the Legislature because the risks generated justify a legislative declaration as to their unreasonableness, this declaration can certainly be used as a standard of conduct in civil cases.

Placing intoxicating liquor in the hands of a drunk, knowing that the person intends to drink and drive is to create an unreasonable risk of injury to motorists and pedestrians. It is a risk readily foreseeable from the point of view of the purveyor at the time he is considering whether or not to make the sale. The California decisions cited above on analogous situations give support to this position.

In view of the foregoing discussion, and also in light of the trend of decisions in this particular realm of tort law in sister jurisdictions, viz:

Rappaport v. Nichols, 31 N.J. 188, 156 A. 2d 1 (1959);

Waynick v. Chicago's Last Dept. Store, 269 F. 2d 332 (7th Cir. 1959);

Soronen v. Olde Milford Inn, 202 A. 2d 208 (N.J. App. 1964);

Jardine v. Upper Darby Lodge No. 1973, Inc., 198 A. 2d 550 (Pa. 1964);

Majors v. Broadhead Hotel, 205 A. 2d 873 (Pa. 1965);

Ramsey v. Melrose Grill, 211 A. 2d 900 (N.H. 1965).

it is respectfully submitted that the complaint does state a cause of action under an exception to the common law rule and it was error for the Court below to dismiss it.

JAMES G. BUTLER,
Attorney for Appellants

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

JAMES G. BUTLER